IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1501

JAMES JEFFERSON McLAIN, et al,
Petitioners,

versus

REAL ESTATE BOARD OF NEW ORLEANS, et al,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF ON BEHALF OF CERTAIN RESPONDENTS

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BRIEF FOR CERTAIN RESPONDENTS

QUESTION PRESENTED

Whether the Court of Appeals correctly decided, on the evidence contained in the depositions taken by Petitioners to overcome Respondents' jurisdictional challenge, that the jurisdiction of the Federal courts under the Sherman Act does not extend to an alleged agreement by Respondent real estate brokers to fix com-

missions on the sale of residential real estate in the Greater New Orleans area.

STATEMENT

So much of the argument in the briefs of Petitioners and the Solicitor General is addressed to broad general propositions and factual matters dehors the record that this counter statement is needed to clarify what is before the Court on this review.

First, the dismissal of which review is sought was not on the face of the pleadings for failure to state a claim on which relief could be granted; rather, dismissal was ordered for lack of subject matter jurisdiction *only after giving Petitioners full opportunity to make the requisite jurisdictional showing and after receipt of evidence submitted by them to satisfy this requirement.* Accordingly, the propriety of the dismissal must be judged on the evidence adduced by Petitioners and not on general, conclusory statements of what might have been proved.

Second, and no less important, the issue presented by this application is not whether residential sales by realtors may be subject to the Sherman Anti-trust Act upon a proper showing of connexity with interstate transactions but whether the proof herein adduced by Petitioners satisfies this requirement of a showing of connexity.[1]

1 This "connexity" may be that the activities are "in" interstate commerce or "directly or substantially affect" interstate commerce.

The only factual allegations of the complaint are that Petitioners, residents of Orleans and Jefferson Parishes, Louisiana, purchased or sold residences in those parishes and that Respondents "provided real estate brokerage" in each transaction.[2] The remaining allegations are non-specific and conclusory: that Respondents "have violated Section 1 of the Sherman Act" and continue to combine and conspire "to restrain interstate trade and commerce in the offering for sale and sale of real estate brokering services"[3]; that the combination and conspiracy consist of a continuing agreement and concert of action "to fix, control, raise, and stabilize prices for the purchase and sale of real estate in a knowing, arbitrary, unreasonable and unlawful way"[4]; and that Respondents have committed "certain overt acts" in furtherance of the combination and conspiracy, principally, promoting and maintaining fixed commission structures and discouraging price competition.[5] No such overt acts are identified.

The jurisdictional allegations — which are critical for this review — are that many residential buyers and sellers are persons moving into or out of New Orleans and that Respondents assist their clients in financing and

2 Complaint, par. IV, McLain Pet. App. 2a-3a. The Complaint was filed on 31 October 1975.

3 Complaint par. XV, McLain Pet. App. 9a.

4 Complaint par. XVI, McLain Pet. App. 9a-10a.

5 Complaint par. XVII, McLain Pet. App. 10a-11a.

insuring with out-of-state sources.[6] Respondents moved to dismiss for lack of subject-matter jurisdiction on the basis of affidavits by two local realtors that the services of a real estate broker were not indispensable to the sale and purchase of real estate in the State of Louisiana, that

> The essential function of a Louisiana real estate broker consists of counseling purchasers or sellers of real estate situated in the State of Louisiana, assisting them in establishing the price of properties and bringing about agreements to purchase and sell. Brokers earn their commissions upon procuring a purchaser or seller, as the case may be, and have essentially completed their function at that time.

and that real estate brokers had nothing to do with financing or title examinations.[7]

---

6 Complaint pars. XIII-XIV, McLain Pet. App. 9a. Petitioners utterly failed to prove the latter allegation and the former was properly dismissed as legally insufficient unless such purchasers or sellers crossed state lines for the purpose of selling or buying residences. Petitioners explicitly recognize the insufficiency of, if they do not altogether abandon, the former contention at page 35 of their brief:

> . . . The extent to which migration or emigration occurs within a given local real estate market is probably not sufficiently uniform to provide a general criterion of interstate commerce involvement. . .

Other than an affidavit by one of Petitioners as to his experience at a time beyond the Statute of Limitations (R. 121), there is no evidence whatsoever supporting this allegation.

7 Affidavits of Max Derbes, Jr. and Dalton Truax, A.41, 43. This statement of the function of real estate brokers is consistent with

Approximately two months after the filing of Respondents' Motion to Dismiss and consideration of the parties' memoranda, the District Judge heard oral argument and took the matter under advisement.[8] On 3 September 1976, three months later, the Judge called a conference of counsel at which the issue of jurisdiction was discussed and following which he issued an order reading in pertinent part:

> The Court advised counsel that it appears plaintiffs may satisfy said jurisdictional requirement only by bringing the facts of this case within the parameters of the Supreme Court's holding in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975). It is recognized, however, that further discovery is needed on the issue of *Goldfarb's* applicability *sub judice*. More specifically, such discovery should determine whether, in the first place, there is the requisite interdepend-

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the law of Louisiana as stated in *Eanes v. McKnight*, 262 La. 915, 265 So.2d 220, 228 (1972):

> The broker earns his commission even if the sale is not consummated when he procures a purchaser, ready, willing and able to buy on terms prescribed by the principal. . .

To the same effect, *see Cooley v. Miller*, 320 So.2d 317, 318-19 (La. App. 3 Cir. 1975).

Louisiana law defines a real estate broker in terms of the activities in which he engages and states, in part, that such a broker is one who "[a]ssists or directs in the procuring of prospects or the negotiation or closing of any transaction, *other than mortgage financing*, which does or is calculated to result in the sale, exchange, leasing, or renting or any real estate . . . ." La. R.S. 37: 1431(2)(f).

8 A. 76-77.

> ence between the brokerage activity of defendants and the financing and/or insuring of real estate transactions in the New Orleans area and, secondly, whether there is a substantial involvement of interstate commerce in such real estate transactions *via* the financing and/or insurance aspects thereof.
>
> The parties shall confer with regard to the procedure of discovery along these lines. Following such discussions, another conference will be held in this matter at 4:00 P.M. on Wednesday, October 13, 1976.[9]

Petitioners took no immediate steps to implement this directive and, at another conference held on 13 October 1976, the District Judge fixed 31 December 1976 as the cut-off date for discovery.[10] Petitioners continued to do nothing until 17 December 1976 when they issued the first of some nine notices of depositions, which were taken at various times between 28 December 1976 and 13 January 1977.[11]

Further memoranda were filed by both Petitioners and Respondents and on 31 May 1977 the District Judge handed down his memorandum opinion and order dismissing the complaint for lack of subject

9 A. 82.

10 R. 317.

11 A. 83-96. On 22 December 1976 Petitioners obtained an additional fourteen-day extension of time to take the depositions. A. 98.

matter jurisdiction.[12] An appeal was taken to the Court of Appeals for the Fifth Circuit, which affirmed the dismissal.[13] It is to review this decision that a Writ of Certiorari was sought and granted.

SUMMARY OF ARGUMENT

Respondents' alleged violation of the Sherman Act by conspiring to fix commissions on the sale of residential real estate in the New Orleans area is a purely intrastate activity. The evidence submitted by Petitioners in opposition to Respondents' motion to dismiss for lack of jurisdiction does not establish any activity on Respondents' part either in interstate commerce or substantially or directly affecting such commerce. Consequently, *Goldfarb v. Virginia State Bar*, in which title examinations by local attorneys were held to be an integral part of interstate financing and title insurance, does not support Petitioners' effort to invoke Federal jurisdiction.

The decisions cited by Petitioners as authority for holding that Respondents' alleged conspiracy to fix commissions on the sale of residential real estate "affect" interstate commerce involved interstate commerce or intrastate activities so closely and essentially integrated therewith as to be inseparable therefrom. The incidental or fortuitous effect of possible in-

12 McLain Pet. App. 17a; reported at 432 F.Supp. 982.

13 McLain Pet. App. 24a; reported at 583 F.2d. 1315 (5 Cir. 1978).

creases in the price of residences and consequent need for additional amounts of interstate financing falls far short of the requisite substantial or direct effect. Petitioners' contentions find no support in the cited authorities.

ARGUMENT

I.

Petitioners Have Failed To Demonstrate That Respondents Have Engaged In Any Activities Which Either Are "In Interstate Commerce" Or "Substantially Or Directly Affect Interstate Commerce."

The Complaint herein was properly dismissed for lack of jurisdiction because of Petitioners' failure to prove that Respondents engaged in any activity which was either in interstate commerce or substantially or directly affected interstate commerce. The "offense" which Petitioners allege to have constituted a violation of Section 1 of the Sherman Act is a conspiracy to fix commissions on the sale of residential real estate in the New Orleans area.[14] It is difficult to conceive of an activity more truly intrastate in nature.

In an effort to subject this patently intrastate activity to Sherman Act jurisdiction, Petitioners allege that many purchasers or sellers of residential real estate are persons moving into or out of the New Orleans area

14 Complaint pars., McLain pet. app. 9a-10a.

and that Respondents assist their clients in securing financing and insurance for such purchases.[15] Respondents moved to dismiss for lack of federal jurisdiction on the basis of affidavits controverting these allegations and essentially reciting that the role of real estate brokers in Louisiana is limited to bringing purchasers and sellers together.[16]

With their opposition to the motion to dismiss, Petitioners submitted affidavits from a loan guaranty officer for the Veterans Administration and an area economist for the Department of Housing and Urban Development as to the volume of VA insured homes and FHA loan operations in the Parishes of Orleans and Jefferson,[17] relying on various authorities and particularly *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1974) as dispensing with the need for further proof.

After hearing oral argument and considering the matter for several months, the District Judge called a conference of counsel and instructed petitioners to conduct whatever discovery they deemed necessary to establish the applicability of *Goldfarb* — on which petitioners had stated they rested their case.

Three and one half months later (out of four months allowed by the District Judge), Petitioners noticed and

15 Complaint pars. XIII, XIV, McLain pet. app. 9a.

16 A. 18-19, 40-44.

17 A. 68-71.

took the depositions of three realtors (Max Derbes, Jr., Stan Weber and A. T. Post), a mortgage banker (Julian O. Hecker, Jr.), a representative of a title insurance company (James W. Mills, Jr.), the president of a homestead (Edmond G. Miranne), the loan guaranty officer of the Louisiana Veterans Administration office (Paul Griener), an area economist in the New Orleans HUD area office (Angel Miranda) and a representative of the New Orleans HUD office for Housing Department on Mortgage Credit (Meaher P. Turner).[18]

These depositions establish nothing more than that substantial amounts of money to finance the purchase of residential real estate in the New Orleans area come from out of state and that title insurance is afforded exclusively by out-of-state corporations. No witness testified, and there is no evidence, that Respondents — in stark contrast to the attorneys examining titles in *Goldfarb* — play a necessary or integral part in financing the purchase of or insuring the title to real estate or even play any part therein. On the contrary, while admitting that real estate agents were normally present at the closing of the sale, these witnesses uniformly testified that financing and insurance were no part of the agent's business.

The mortgage banker (Hecker) testified that realtors assisted in obtaining documentation for processing of loans, but that their services were to bring the purchaser and seller together and that these services

18 Excerpts from all of these depositions except those of A. T. Post and Paul Griener are incorporated in the appendix commencing at A. 122.

were in no way an integral part of the process of lending.[19] The homestead president (Miranne) was more specific and more emphatic; while acknowledging that real estate agents sometimes brought borrowers to his homestead and sometimes remained with the borrower, he said:

> You prefer them not to sit there, because, frankly, making a loan is none of their business, the real estate agent. I don't mean that to be derogatory. It is not the agent's job.[20]

In response to a question as to the real estate agent's role in obtaining the loan, Mr. Miranne said:

> No role whatsoever, other than merely to bring the person down here. . . .
>
> We basically do not need the realtor at all to bring him down and, basically, we would prefer just to talk directly to the borrower, . . . And, the agent may not like me to say this, but they play no part other than to get them to us . . .[21]

Responding to a question as to the role played by real estate agents in the homestead's granting or not granting the loan, Mr. Miranne said:

19 A. 195, 198.

20 A. 137-138. Homesteads in Louisiana correspond to savings and loan associations in other states.

21 A. 145-6.

They would play no part at all. I would say they play no role other than a person to get them to us and sit them down, and that is about it.[22]

* * *

Q. Would it be a fair statement to say that in your opinion, a realtor's services are not essential to the making of a loan through Security Homestead?
A It would be a fair statement to make that, yes.[23]

Mr. Miranne likewise denied that the real estate agent played any role in examination of the title to the property or in underwriting the lending.[24]

Controverting Petitioners' allegation on information and belief in paragraph VI of their complaint, Mr. Derbes categorically denied that the Real Estate Board of New Orleans was a member of Realtron, Inc.[25] He also testified that he personally was aware of hundreds of houses which were sold by builders without interposition of a real estate broker.[26]

22 A. 146-7 (emphasis added).

23 A. 148, 157.

24 A. 151-157.

25 A. 237-239.

26 A. 252. This testimony is consistent with the statement made in Petitioners' brief as to the Senate Committee Report on the Real Estate Settlement Procedures Act of 1974 that about 60% of the real estate transactions studied reported payment of a real estate commission, the balance being presumably sold by the owner or builder directly, Petitioners' brief, 37.

Mr. Weber testified that any referral commissions received by him on the sale of property outside of the State of Louisiana were not for the sale of the property, but from the selling agent for putting him in touch with the purchaser.[27]

As the Court of Appeals for the Fifth Circuit observed, real property is the quintessential local product[28] and this Court, in *U.S. v. National Association of Real Estate Boards*, 339 U.S. 485, 488, 70 S.Ct. 11, 94 L.Ed. 1007 (1950), specifically noted that no interstate commerce was involved in alleged fixing of commissions for the sale of real estate. It is only where some nexus with interstate commerce is shown, either by integrating the intrastate operation into an identifiable stream of interstate commerce or by proof that the intrastate operation directly or substantially affects interstate commerce, that the undeniably intrastate character of Respondents' alleged agreement to fix the level of commissions on the sale of residential real estate can be overcome. Petitioners' proof falls far short of this requirement and the judgment of dismissal entered by the District Court and affirmance of this judgment by the Court of Appeals for the Fifth Circuit were and are correct and should be affirmed by this Court.

Reference is repeatedly made both in the brief of Petitioners and in that of the Solicitor General to the "activities" of real estate agents generally; the issue for

27 A. 286.

28 583 F.2d 1315, 1319.

determination herein, however, is not whether some unspecified activities on the part of real estate agents might subject them to the jurisdiction of the Sherman Act, but whether the evidence herein adduced by Petitioners for the purpose of satisfying the jurisdictional requirement is sufficient to support a finding that the alleged agreement of Respondents to fix the level of real estate commissions on the sale of residential real estate in the New Orleans area was in or directly or substantially affected interstate commerce.

It is clear from Petitioners' evidence that Respondents do not obtain and are not instrumental in obtaining financing of credit sales and are not involved in examining titles or obtaining title insurance on behalf of their clients. The record is clear that Respondents' function is to counsel purchasers and sellers of real estate in Louisiana, to assist them in establishing prices and to bring about agreements to purchase and sell.[29] Respondents earn their commission for the service of procuring a purchaser or seller for their client and, when they do, essentially complete their duties.[30] Even where the agreement makes payment of a commission contingent upon the purchaser's procuring financing, it is the purchaser rather than the broker who dictates

29 Affidavits of Messrs. Derbes and Truax, A. 40-1, 42-43.

30 The broker may, and frequently does, agree that no commission is to be paid if the purchaser fails to obtain financing. Even if the sale is not consummated, however, the broker "earns" his commission for procuring a purchaser ready, willing and able to purchase upon the principals' terms. *See Eanes v. McKnight*, 262 La. 915, 265 So.2d 220 (1972); *Cooley v. Miller*, 320 So.2d 317, 318-319 (La. App. 3d Cir. 1975).

that term, thereby obligating himself to make a good faith effort to secure the needed funds.[31]

Respondents have no authority at all under the standard listing agreement to obtain financing for their clients and have no essential role in the loan process.[32] The alleged practices of brokers' inquiring of mortgage bankers as to the terms of available financing or accompanying their clients to mortgage offices fall far short of bringing brokers into "participation" in financing.[33] Moreover, it is the lender, not the broker, who requires that the purchaser insure the title to property and the purchaser himself deals directly with the title insurance company.

Loan guarantees by the Veterans Administration and HUD likewise do not involve Respondents nor require their assistance.[34] HUD subsidies are paid directly to the lender or mortgagee without a broker's intervention;[35] nor does the VA deal with the broker in deciding whether to guarantee a loan for the purchaser.

31 The purchaser's interest in obtaining the commission at the time the purchase agreement is executed is necessarily adverse to postponement in this fashion.

32 Miranne deposition, A. 157. Absent special agreement, the broker has no authority to bind his principal or to negotiate in his behalf. *See Leggio v. Realty Mart, Inc.*, 303 So.2d 920 (La. App. 1st Cir. 1974). Brokerage services are contracted for independently of financing as evidenced by separate listing, purchase and loan agreements.

33 Miranne deposition, A. 148, 157; Hecker deposition, A. 198.

34 Miranne deposition, passim.

35 Turner deposition, A. 225-227.

It is clear, therefore, that Respondents neither "assist" nor "participate" in obtaining financing, title insurance and loan subsidies or guarantees.

That some Respondents may subscribe to national relocation services is irrelevant, since Petitioners do not complain of price-fixing in this distinct aspect of the brokerage business. This fact does not establish jurisdiction, since jurisdiction must be based on a nexus between the acts complained of and the alleged effect upon commerce. The test of jurisdiction under the antitrust laws is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business.[36]

The requisite direct effect upon commerce is not established by the incidental interstate movement of some of Respondents' customers.[37] The fact that Respondents hold funds in escrow is likewise insufficient to confer jurisdiction, since this activity has no effect on the price of brokerage services.[38]

Every local enterprise inevitably has some effect, however remote, upon interstate commerce, but some

36 *Page v. Work*, 290 F.2d 323, 330 (9 Cir. 1961).

37 *Marston v. Ann Arbor Property Mgmt. Ass'n*, 302 F.Supp. 1276, (E.D. Mich. 1969); *Elizabeth Hospital, Inc. v. Richardson*, 269 F.2d 167 (8 Cir. 1959).

38 Moreover, there was no proof that escrow funds are derived from interstate sources.

de minimis factor must intervene. Thus any increase in the amount of interstate financing resulting from higher brokerage commissions (presumed but not proved) is no more than an incidental or fortuitous effect of such higher commissions.[39] As is more fully discussed in the following section of this brief the "effect" on interstate commerce required to subject an intrastate activity to federal jurisdiction must be possible frustration of the interstate activity to which it is related, stifling or restraint of interstate commerce, or result from its being an essential and integral part thereof. If this were not so, federal regulation would be boundless and intrastate commerce would be completely destroyed as a legal concept.[40]

Petitioners' present ambivalence toward the decision of this Court in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1974),[41] and the implication that the requirement of showing of facts comparable to those in *Goldfarb* was the District Judge's idea stand in interesting contrast to Petitioners' enthusiastic and unreserved reliance on *Goldfarb* in the district

39 Petitioners' claim that an increase in brokerage commissions affects the amount financed is spurious because financing is based upon the appraised value of property, rather than upon the price of the property.

40 *Rasmussen v. American Dairy Ass'n*, 472 F.2d 529, 536 (10 Cir. 1972).

41 In their Summary of Argument, Petitioners contend that *Goldfarb* is of only limited relevance, (Petitioners' brief, p. 12) and *Goldfarb* is distinguished as an "in commerce" case, "the methodology" of which was misapplied to the instant case (Petitioners' brief, pp. 12-13).

and appellate courts. Despite this ambivalence, Petitioners persist in their misreading of *Goldfarb;* for example, they say

> In *Goldfarb v. Virginia State Bar*, the Court held that transactions in land, the most local commodity, have interstate commerce aspects.[42]

and

> Since in *Goldfarb* the question of the application of the Sherman Act to the real estate market was a matter of first impression, . . .[43]

Your Honors' decision in *Goldfarb* did *not* hold that transactions in land have interstate commerce aspects. The regulated activity in *Goldfarb* was examination of titles to real estate, which the defendant Bar Association contended was exempt from federal regulation because the titles examined were to real estate. The holding in *Goldfarb* was simply that the legal service in question, for which a minimum fee was prescribed by the Bar Association, was an integral part of financing, title insurance and loan guarantees, all of which were indisputably interstate in character.

Contrary to Petitioners' contention, *Goldfarb* did not hold that transactions in land have interstate commerce aspects, but that examination of titles to real

42 Petitioners' brief, pp. 18-19.

43 Petitioners' brief, p. 19.

estate, being indispensable to interstate financing and title insurance, constitutes an integral part of an interstate transaction. There was no holding as to transactions in land generally, but only as to the legal service of title examination which was held to be subject to federal regulation notwithstanding that the titles examined were to real estate.

The *Goldfarb* test is satisfied only by a two-fold determination that the activity complained of is (1) an essential, integral part of (2) the interstate aspects of the transaction. Thus, not only must Petitioners establish that Respondents' services are essential to an interstate transaction — itself a dubious proposition in view of the number of sales that concededly occur without broker involvement[44] — but they must also establish that the local services are indispensable to the *interstate aspects of the transactions.*

Petitioners have not satisfied this requirement, but have resorted to unfocused generalizations about the "local real estate market" and "the activities of realtors".[45] Interstate commerce is, however, "an intensely practical concept drawn from the normal and accepted course of business."[46] It is not to be determined by labels or generalizations. An examination of Petitioners' efforts to identify concrete examples in support of

44 Derbes' deposition, A. 40-42; Petitioners' brief, p. 37.

45 *See, e.g.*, Petitioners' brief, p. 49.

46 *United States v. Yellow Cab Co.*, 332 U.S. 218, 231, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947).

these abstractions reveals that the alleged nexus between Respondents' services and interstate commerce is here at most remote and incidental.

Petitioners would have your Honors stand *Goldfarb* on its head. The intrastate activity in *Goldfarb* (examination of titles) was held to be subject to the Sherman Act because it was determined to be "an integral part of an interstate transaction", viz. title insurance and realty financing. This was so because title examination was a prerequisite to title insurance and financing and was a means to that end.

By contrast, Respondents' services are not a prerequisite to either title insurance or financing[47] and the sale is an end in itself subsequent to which a buyer may or may not obtain title insurance and financing depending upon his needs and desires. The roles of the attorney in *Goldfarb* and Respondents are wholly dissimilar.

Petitioners contend that the amount of the real estate agent's commission determines the cost of a house, that the increased cost attributable to the real estate commission in turn determines the amount financed (through interstate sources) and that fixing commissions in this fashion "affects" interstate commerce. This facile reasoning is deficient because it takes no account of the meaning of "effect on interstate commerce" as enunciated by this Court in its various

47 Many residences are sold otherwise than through real estate agents. Affidavit of Max Derbes, A. 252; Petitioners' brief, p. 37.

"affectation" decisions. These decisions are analysed in the following portion of this brief.

II

Petitioners Have Cited No Authority For The Proposition That As A Matter Of Law An Agreement To Fix Brokers' Fees For The Sale Of Residential Real Estate, In And Of Itself, Is Subject To The Sherman Act.

In considering the sufficiency of Petitioners' evidence on the issue of jurisdiction, the allegations of the complaint as to the restrained activity must be borne in mind. The only "offense" charged in the complaint is an alleged agreement to fix commissions on the sale of residential real estate.[48] It follows from this that *this particular activity* on Respondents' part must somehow be shown to be in interstate commerce (a contention apparently abandoned by Petitioners in their brief)[49] or substantially or directly to affect interstate commerce.

Petitioners place principal reliance on *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219, 68 S.Ct. 996, 92 L.Ed. 1328 (1948); to a lesser extent, they rely also on *Burke v. Ford*, 389 U.S. 320, 88 S.Ct. 443, 19 L.Ed.2d 554 (1967); *United States v. Womens' Sportswear Ass'n*, 336 U.S. 460, 69 S.Ct. 714, 93 L.Ed. 805 (1949); *United States v. Employing Plasterers Ass'n*, 347 U.S. 186, 74 S.Ct. 452, 98 L.Ed. 618 (1954); *United States v. Employing*

48 Complaint Pars. XV-XVI, Pet. App. 9a-11a.

49 Petitioners' brief, pps. 12-13.

Lathers Ass'n, 347 U.S. 198, 74 S.Ct. 455, 98 L.Ed. 627 (1954); and *Hospital Building Co. v. Rex Hospital Trustees*, 425 U.S. 738, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976). Petitioners' reliance is misplaced, as the teaching of these cases is that the "affectation" requisite to federal jurisdiction requires a showing of more than some incidental effect on price.

Mandeville Island Farms, despite use by this Court of the term "affectation", on its facts is an "in commerce" case. The plaintiffs in *Mandeville Island Farms* were growers of sugar beets and the defendants refiners; their endeavors were not separate and independent, however, but were inextricably linked. Thus the refiners, who were admittedly in interstate commerce, controlled the supply of seed needed by the plaintiffs to plant their crops. They entered into contracts with plaintiffs for the latter to grow sugar beets, under the term of which the refiners were given the right to supervise the growing, including the right to ascertain quality during growing and harvesting seasons by sampling and polarizing. In addition, the contracts required the plaintiffs to make preliminary preparations for processing the sugar beets into raw sugar, so that the growing of sugar beets was effectively made a subsidiary operation by the refiners and gave them control from the farm to the consumer.

Dismissal having been entered on the face of the pleadings, Your Honors determined the legal issues

with relation thereto[50] and noted that these allegations related specifically to

> . . . the peculiarly integrated character of the industry, effects of the arrangements upon interstate commerce, and the relation between the violations charged and the injuries suffered by petitioners.[51]

The "unique structure and special mode of operation" of the industry was noted[52] and the contention that growing and refining were two entirely separate activities (the former intrastate) was explicitly rejected on the grounds that this contention did not take into account the "economic continuity" of production and manufacturing on the one hand and commerce on the other.[53]

Commenting further on the special nature of the relationship between the plaintiffs as growers and the defendants as refiners, the Court observed:

> For this is not a case involving only 'a course of conduct wholly within a state'; it is rather one involving 'conduct which is an inseparable element of a larger program dependent for its

50 334 U.S. at 221.

51 *Id.* at 224.

52 *Id.* at 224-5.

53 *Id.* at 229.

success upon activity which affects commerce between the states,' and in such a case it is not material that the source of the forbidden effect upon that commerce arises in one phase or another of that program.[54]

* * *

We deal here, as petitioners say, with an industry tightly interwoven from sale of the seed through all the intermediate stages to and including interstate sale and distribution of the sugar. In the middle of all these processes and dominating all of them stand the refiners.[55]

* * *

Finally, the interdependence and inextricable relationship between the interstate and the intrastate effects of the combination and monopoly are shown perhaps most clearly by the provision of the uniform price agreement which ties in the price paid for beets with the price received for sugar.[56]

In conclusion, the Court referred to "an industry so completely interlocked in all its stages, by all-inclusive contract as well as by industrial structure and organization" and explicitly limited its holding to the facts of that case:

54 *Id.* at 237.

55 *Id.* at 239.

56 *Id.* at 241-2.

We deal with the facts before us. With respect to others which may be significantly different, for purposes of violating the statute's terms and policy, we await another da[57]

It is submitted that the critical and distinguishing aspect of *Mandeville Island Farms* is that what would normally have been a purely intrastate activity, viz. the growing of sugar beets, was so inextricably integrated into an admittedly interstate overall process of growing, refining and selling sugar that it could no longer be considered to be separate. This is explicitly recognized in the following language:

To compare an industry so completely interlocked in all its stages, by all-inclusive contract as well as by industrial structure and organization, with one like producing, processing, and marketing fruits, vegetables, corn or other products, susceptible of various uses and under conditions affording varied outlets for market, both local and interstate, in the raw or refined state, in which neither such a contractual nor such an industrial integration exists, is to ignore the facts of industrial life. So is it also to make conclusive comparisons with other industries in which the manufacturing process requires and has available a greater variety of raw materials for making the finished product, and involves a longer and more extensive process of change,

57 *Id.* at 243-4.

than does extracting the sugar content of beets to make raw sugar.[58]

To compare the supposed unquantified effect on interstate financing, title insurance and loan guarantees of increases in price of real estate reflecting higher brokerage commission with the unique interlocking of interstate and intrastate activities in *Mandeville Island Farms* is to demonstrate the complete insufficiency of petitioners' showing.[59]

Burke v. Ford had to do with territorial division of the State of Oklahoma by liquor wholesalers therein, which the Court found "almost surely" resulted in fewer sales to retailers and therefore fewer purchases from out-of-state distillers than would have occurred in the presence of free competition. The Court found, in addition, that the consequence of the division was fewer wholesaler outlets available to any one out-of-state distiller, in consequence of which the state-wide wholesalers market division "inevitably affected interstate commerce."[60] There is no suggestion of reduction in

58 *Id.* at 243-4.

59 Petitioners refer in a footnote to *Wickard v. Filburn*, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942), Petitioners' brief p. 51. Regulation of the normally intrastate activity of growing wheat was justified in Wickard on the grounds that uncontrolled growing could frustrate the congressional purpose of stimulating trade in wheat at increase prices. The record herein is devoid of any suggestion that increased real estate commissions on residences will obstruct or have any effect whatsoever on interstate financing, title insurance or loan guarantee programs.

60 389 U.S. at 322.

demand for out-of-state financing, title insurance or loan guarantees in the record herein.

Employing Plasterers and *Employing Lathers*, like *Mandeville Island Farms*, presented a continuous flow of materials from out-of-state manufacturers to home owners. Commenting on the nature of the industry, Your Honors observed:

> The practical effect of all this is a continuous and almost uninterrupted flow of plastering materials from out-of-state origins to Illinois job sites for use there by plastering contractors. Restraint or disruption of plastering work in the Chicago area thus necessarily affects this interstate flow of plastering materials adversely. . . . The effect of all this has been an unlawful and unreasonable restraint of the flow in interstate commerce of materials used in the Chicago plastering industry.[61]

Dismissal having been granted on the grounds that the complaint failed to state a cause of action on which relief could be granted under the Sherman Act (as in *Mandeville Island Farms*), the Court held that a sufficient restraint of trade in interstate commerce was alleged to constitute a cause of action. Here again, there was an integrated industry, the interstate portions of which were directly and substantially affected by the intrastate portions.

61 347 U.S. at 188.

Women's Sportswear involved agreements by stitchers, who would normally have been indisputably in intrastate commerce, which imposed restraints on jobbers, who were indisputably in interstate commerce. This court found that the stitching contractors' combination imposed restraints on the interstate activities of the jobbers of a character and magnitude to violate the Sherman Act:

> The source of the restraint may be intrastate, as the making of a contract or combination usually is; the application of the restraint may be intrastate, as it often is; but neither matters *if the necessary effect is to stifle or restrain commerce among the states.*[62]

It will be noted that the determinative criterion in *Women's Sportswear* was the stifling or restraint of interstate commerce, of which there is no evidence whatsoever in the instant case.

Hospital Building Company, in common with other progeny of *Mandeville Island Farms,* found a substantial effect on interstate commerce from restraint of intrastate activity where there were important areas of interstate commerce involved. Thus reliance was placed on, first, the plaintiff's purchase of a substantial proportion of its medicines and supplies from out-of-state sellers, second, the fact that a substantial number of its patients were alleged to come in from out of

62 336 U.S. at 464 (emphasis added).

state,[63] third, a large proportion of plaintiff's revenue was alleged to come from insurance companies outside of the state or from the federal government through Medicaid and Medicare, fourth, plaintiff's payment of a management service fee based on gross receipts to its parent company, a Delaware corporation based in Georgia, and fifth, plaintiff's having developed plans to finance a large part of its expansion through out-of-state lenders. Referring to these aspects of plaintiff's operations, this Court observed:

> This combination of factors is certainly sufficient to establish a "substantial effect" on interstate commerce under the Act.[64]

Your Honors characterized the allegations of the complaint as fairly claiming that the alleged conspiracy, to the extent that it might be successful, would place unreasonable burdens on the free and uninterrupted flow of interstate commerce and were therefore wholly adequate to state a claim.

Of particular importance in considering these authorities from which petitioners seek to draw comfort, it should also be borne in mind that, in most of them, dismissal was on the face of the pleadings for failure to state a claim on which relief could be granted so

63 Unlike the unidentified purchasers or sellers of homes alluded to in Petitioners' brief, such persons crossed state lines for the purpose of using the services of the hospital.

64 425 U.S. at 744.

that the criterion was the sufficiency of the allegations of the complaint. By contrast, Respondent's motion to dismiss did not challenge the legal sufficiency of the allegations of the complaint, but controverted them, and Petitioners were given ample opportunity to adduce proof of the facts alleged.[65]

Petitioners' contentions are confusing and inconsistent. On the one hand, they seek to rely on *Goldfarb* because, as they say, it held that real estate transactions were subject to the Sherman Anti-Trust Act, which of course is wholly incorrect. On the other hand, they disclaim *Goldfarb* as being an "in commerce" case and say that theirs is an affectation of commerce case. Further, they argue now in terms of the effect of interstate commerce on intrastate commerce and then in terms of the effect of intrastate commerce on interstate commerce.

The ultimate fact is that the role of Respondents, as real estate brokers define their role, in the words of the Derbes and Truax affidavits, which have at no time been controverted, is "counseling purchasers or sellers of real estate situated in the State of Louisiana, assisting them in establishing the price of property and bringing about agreements to purchase and sell." They

65 The implication contained in Petitioners' brief that they were denied the opportunity of other, more meaningful, discovery is not to be taken seriously. In the first place, as noted above, Petitioners themselves relied on *Goldfarb* as authority for jurisdiction and, in the second place, the trial judge's directive was issued only after a conference with counsel (followed by two more conferences before the matter was submitted for decision) at which Petitioners could have asked for broader discovery had they believed it desirable.

play no part in the interstate financing of real estate purchases, in out-of-state title insurance thereon or in interstate guarantees of mortgages.

There is no similarity between these activities and those of the growers in the integrated sugar industry at issue in *Mandeville Island Farms* or any of the other situations in which a direct or substantial effect on interstate commerce was found. Petitioners have utterly failed to demonstrate the requisite direct or substantial effect.

United States v. Foley, 598 F.2d 1323 (4th Cir. 1979), wherein the defendant real estate brokers were held to be subject to the Sherman Act, is in no way at variance with the decision of the Court of Appeals herein. The same test was applied by both courts, viz. whether the defendants' activities were an integral part of interstate commerce, but to widely different factual situations:

> In this case, as in *Goldfarb*, the evidence was quite sufficient to permit the trier of fact to determine that the activities in question, here those of real estate brokers, were as a matter of practical necessity *an integral part of an identifiable stream of interstate real estate transactions.*[66]

Foley was an appeal from a conviction in a criminal anti-trust proceeding and the appeal was decided on the

66 598 F.2d at 1329 (emphasis added).

full record. The evidence in that record was completely different from that herein.

First, a "quite considerable volume" of transactions involved purchasers coming into the state and sellers leaving the state. Montgomery County in which the defendants carried on their business, was a suburb of the District of Columbia and the court found that the defendants had:

> . . . consciously and understandably capitalized upon the highly transient nature of this particular real estate market.

In a footnote to its opinion, the court commented further on the active and aggressive efforts on the part of defendants to obtain customers from purchasers coming into the state and sellers leaving the state:

> . . . there was much more of an interstate character to defendants' activities than merely awaiting passively the chance descent of out-of-state customers and then providing these with a purely 'local' service.[67]

Second, there was extensive advertising of brokerage services by various defendants in out-of-state media, including military and civil service personnel journals.

67 *Id.* at 1330 n.4.

Third, some defendants participated in national "relocation" services and extensively used interstate channels of communication in developing and servicing the out-of-state clientele.

Fourth, considerable financing was provided by out-of-state lending institutions and substantial numbers of purchase loan mortgages were guaranteed by federal agencies headquartered in the District of Columbia.

Fifth, while the defendants did not participate directly in the interstate lending and loan guarantee transactions,

> . . . they clearly held out as part of their brokerage services their ability to facilitate these. . . .[68]

In the footnote to this finding, the court cited an advertisement by one defendant that potential purchasers should consult a broker because of his ability to guide them to a loan and ability to negotiate the best available financing.[69]

By contrast, there is no evidence herein of the active pursuit of out-of-state customers. While there is an affidavit by one of the petitioners (Koch) that he had

68 *Id.* at 1330.

69 *Id.* at 1330 n.9.

purchased a home before moving to Louisiana, this transaction took place outside of the statute of limitations. There is no specific evidence of extensive advertising in out-of-state media. There is no specific evidence of participation in national relocation services and/or extensive use of interstate channels of communication in developing and servicing out-of-state clientele and the evidence directly controverts any suggestion of direct participation in interstate lending and loan guarantee transactions.

The Fourth Circuit Court of Appeals' conclusion that:

> The overall picture that emerges is one of a substantial stream of interstate commerce in which these brokers' activities were not only an "integral part", but in practical effect the dominant factor in first creating a substantial interstate market by utilizing interstate advertising and referral services, and then drawing in interstate funding and loan guarantees for the resulting purchase money mortgages. . . .

appears to be justified by the record in that case, but would find no support whatsoever in the record herein. For all of these reasons, it is submitted that there is no conflict between *Foley* and the instant case, but, on the contrary, both cases apply the same test and simply present wholly different factual situations.

In its opinion the Fifth Circuit disposed of the contention that there exists a true "conflict" of authority on the sufficiency of the nexus between the services of brokers with interstate commerce by its recognition that diverse rulings resulted in part from "varying factual gradations".[70] The facts in *Foley* are at the opposite end of the spectrum from those adduced by Petitioners herein.

The facts of *United States v. Yellow Cab Co.*, 332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947), illustrate the jurisdictional distinction between local services which have only an incidental effect on interstate commerce and local services which form an integral part of interstate commerce. There, the Government charged taxicab companies with conspiring to eliminate competition in the business of providing taxicab services in the Chicago area. This Court analysed two separate aspects of taxicab services: (1) defendants' contracts with railroads to transport interstate passengers between connecting trains at different Chicago train stations; and (2) defendants' general intracity taxicab service.

The Court viewed the local taxicab service between stations in relation to the entire interstate journey and characterized this service "an integral step" in the interstate movement of passengers.[71] The alleged restraint on such a constituent part of interstate com-

70 583 F.2d at 1320. *See* Respondents' brief in opposition to petition for certiorari, at pp. 17-24 for a reconciliation of these authorities.

71 332 U.S. at 228-29.

merce brought the Sherman Act into operation.[72] The Court reached the opposite conclusion, however, when it analysed defendants' general intracity taxi service.

The Government argued that the defendants' general service affected interstate commerce because many travelers began or ended interstate journeys by taking taxis to or from railroad stations. This Court held, however, that this service was not subject to the Sherman Act because its effect on interstate commerce was wholly incidental. This Court distinguished the general intracity service from that between railroad stations as follows:

> We hold, however, that such transportation is too unrelated to interstate commerce to constitute a part thereof within the meaning of the Sherman Act. These taxicabs, in transporting passengers and their luggage to and from Chicago railroad stations, admittedly cross no state lines; by ordinance, their service is confined to transportation "between any two points within the corporate limits of the City." None of them serves only railroad passengers, all of them being required to serve "every person," within the limits of Chicago. They have no contractual or other arrangement with the interstate railroads. Nor are their fares paid or collected as part of the rail-

72 *Id.* at 229.

road fares. In short, their relationship to interstate transit is only casual and incidental.[73]

* * *

> Here we believe that the common understanding is that a traveler intending to make an interstate rail journey begins his interstate movement when he boards the train at the station and that his journey ends when he disembarks at the station in the city of destination. What happens prior or subsequent to that rail journey, at least in the absence of some special arrangement, is not a constituent part of the interstate movement. The traveler has complete freedom to arrive at or leave the station by taxicab, trolley, bus, subway, elevated train, private automobile, his own two legs, or various other means of conveyance. Taxicab service is thus but one of many that may be used. It is contracted for independently of the railroad journey and may be utilized whenever the traveler so desires. From the standpoints of time and continuity, the taxicab trip may be quite distinct and separate from the interstate journey. To the taxicab driver, it is just another local fare.[74]

In sum, the teaching of *Yellow Cab* is that Sherman Act jurisdiction exists only if an alleged restraint acts

73 *Id.* at 230-31.

74 *Id.* at 231-32.

directly upon interstate commerce, or is an *integral and inseparable* part of another transaction that involves substantial interstate commerce. *Yellow Cab* likewise holds that wholly local activity that is only *incidentally or fortuitously* related to interstate commerce is not subject to the Sherman Act.

The relationship between the brokerage services here at issue and interstate commerce is attenuated at best. Respondents' local services are not essential to the interstate activity which allegedly accompanies some sales of realty. Unlike the taxi service between stations in *Yellow Cab* and the attorneys' services in *Goldfarb*, Respondents' services are not an integral part of interstate commerce. No legally cognizable nexus between the brokerage services and interstate commerce appears from the facts before the Court.

CONCLUSION

The evidence submitted by Petitioners on the issue of jurisdiction is plainly insufficient and was properly so held by the District Court and the Court of Appeals. Respondents were not shown to play any part in any interstate financing incident to the purchase of residences or in insuring titles thereto. Unlike the role of the attorneys in *Goldfarb* who examined titles for interstate lenders or title insurers, which activity was an essential and integral part of the interstate process of financing and title examination, Respondents' activities are neither in nor do they substantially or directly

affect interstate commerce. The requisite nexus with such commerce is absent.

Mandeville Island Farms and other decisions cited by Petitioners as authority for the proposition that Respondents' alleged conspiracy to fix commissions on the sale of residential real estate in the New Orleans area substantially or directly affects interstate commerce are inapposite. In each such decision the interstate activity was determined to be so closely related as to have the potential of frustrating, stifling or restraining interstate commerce or to be so closely and inextricably integrated with interstate commerce as to be effectively inseparable therefrom. No such showing has been made herein.

The Court of Appeals correctly decided that, on the evidence submitted by Petitioners to overcome Respondents' jurisdictional challenge, Petitioners failed to show that Respondents' alleged conspiracy either was in or substantially or directly affected interstate commerce. The decision of the Court of Appeals upholding the District Judge's Dismissal of Petitioners' complaint should accordingly be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify this ____ day of September, 1979 that I have served three copies of the foregoing Brief For Certain Respondents upon Mr. Richard G. Vinet, 144 Elk Place, Suite 1202, New Orleans, Louisiana 70112, Attorney for Petitioners, by mailing same, postage prepaid, addressed to him at his office.

HARRY McCALL, JR.